EXHIBIT A-9

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Case No. 2016-31648

COBALT INTERNATIONAL ENERGY, INC.,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	HARRIS COUNTY, TEXAS
	§	
v.	§	
XL SPECIALTY INSURANCE CO, et al.	§	
	§	125TH JUDICIAL DISTRICT
Defendants.	§	

DEFENDANT AXIS INSURANCE COMPANY'S PLEA
TO THE JURISDICTION OR, IN THE ALTERNATIVE, PLEA IN ABATEMENT

Defendant AXIS Insurance Company ("AXIS"), by its undersigned counsel, submits this plea to the jurisdiction or, in the alternative, plea in abatement pursuant to Rule 85 of the Texas Rules of Civil Procedure in response to the Third Amended Petition of Cobalt International Energy, Inc. ("Cobalt") and the First Amended Petition in Intervention of Intervenors Jack E. Golden, Jon A. Marshall, D. Jeff van Steenbergen, Myles W. Scoggins, Martin H. Young, William P. Utt, Kenneth W. Moore, Jr., James W. Farnsworth, Joseph H. Bryant, John P. Wilkirson, J. Hardy Murchison, Peter R. Coneway, N. John Lancaster, Jr., Henry Cornell, and Kenneth A. Pontarelli ("Interveners," and, together with Cobalt, "Plaintiffs").

I. INTRODUCTION

Plaintiffs seek a declaratory judgment that AXIS is obligated to provide insurance coverage for underlying securities claims and investigations against Cobalt.

Plaintiffs recognize, as they must, that the *excess* D&O insurance policy issued by AXIS may provide coverage only after Cobalt exhausts the $20 million in coverage under the underlying primary D&O insurance policy issued by XL Specialty Insurance Company ("XL").

The underlying securities litigation remains pending and there has been no determination of Cobalt's liability, if any, on those claims. As well, Plaintiffs do not allege that they have incurred or paid more than $20 million in costs to defend the underlying litigation and investigations.

In these circumstances, Plaintiffs fail to present a ripe controversy with AXIS or standing to assert one, and the Court should dismiss or abate Plaintiffs' claims against AXIS for either or both of the following reasons.

First, the uncontested jurisdictional facts as pleaded by Plaintiffs show that theirs claims are not ripe. Ripeness is a required component of subject-matter jurisdiction.

Plaintiffs' claims are not ripe because the underlying litigation has not been resolved and Cobalt's obligations in the underlying litigation, if any, remain uncertain. Plaintiffs also do not allege that they have incurred more than $20 million in defense costs such that AXIS could even possibly be obligated to pay any amount under its excess policy either now or in the foreseeable future. Plaintiffs thus seek an impermissible advisory opinion about their *possible* right in the unforeseeable future to obtain insurance coverage from AXIS.

No ripe dispute between Plaintiffs and AXIS is presented in these circumstances, and the Court should dismiss or abate Plaintiffs' claims against AXIS for lack of subject-matter jurisdiction.

Second, the uncontested jurisdictional facts as pleaded by Plaintiffs show that Plaintiffs have not satisfied the requirements of the "no action" clause in the relevant insurance policy. Failure to comply with the requirements of the no action clause means that Plaintiffs lack standing to sue.

The AXIS excess policy provides that "[n]o action" may be taken by Plaintiffs against AXIS unless "as a condition precedent": (1) there has been "full compliance with all of the terms and conditions" in the AXIS excess policy, and (2) Plaintiffs' obligations in the underlying securities litigation have been "finally determined either by judgment against [Plaintiffs] after actual trial, or by written agreement of the Insured, the claimant and the insurer."

Neither of these conditions has been satisfied here. Plaintiffs do not allege that they have complied with the terms and condition in the AXIS excess policy that requires exhaustion of the $20 million in underlying coverage before coverage may be triggered. Neither has there been any determination of Plaintiff's obligations, if any, in the underlying securities litigation, which remains pending and unresolved. Plaintiffs have not satisfied the "conditions precedent" in the "no action" clause, and, accordingly, Plaintiffs lack standing to sue AXIS.

II. STATEMENT OF FACTS

Cobalt filed this suit in May 2016 against its primary D&O insurer, XL. Cobalt asserts that XL violated its obligation to pay for costs and expenses incurred by Cobalt to defend an underlying securities litigation and investigation.[1]

Cobalt filed its Third Amended Petition (the "Petition") on December 26, 2016. It added AXIS as a defendant in this litigation. Cobalt continues to assert in the Petition that its primary insurer, XL, breached its insurance policy and violated the Texas Prompt Payment of Claims Act by failing to pay for certain of the costs incurred by Cobalt in the underlying securities matters.[2]

With regard to AXIS, however, Cobalt asserts only a single cause of action in which it seeks a declaration that Cobalt is "entitled to coverage by AXIS." (Petition at ¶ 77). Cobalt does *not* assert any breach of contract claim against AXIS or assert that AXIS is obligated to pay any

[1] These underlying matters are comprised of claims involving (a) investigations of possible violations of the Federal Corrupt Practices Act ("FCPA") arising from "Cobalt's relationship with [Nazaki Oil and Gas] and Nazaki's purported association with senior Angolan government officials" and disclosures to shareholders about the circumstances of those investigations, and (b) Cobalt's disclosures to shareholders "about two wells that Cobalt drilled in 2013 and 2014." (Petition, ¶¶ 11, 14-15.)

[2] Cobalt contends that the claims involving the wells drilled in 2013 and 2014 should be covered by a separate D&O policy issued by defendant Illinois National Insurance Company ("Illinois National") for a later period of time beginning on December 12, 2012, and that only the claims involving the FCPA investigation claims should be covered by the earlier policy issued by XL. (Petition, ¶¶ 15-16.)

amount under its excess policy or that such an obligation is imminent. Rather, Cobalt asserts only that AXIS "either has denied *or intends to deny* coverage for these claims." (Petition ¶¶ 33, 58 (emphasis added)).

AXIS issued an excess D&O policy to Cobalt. It is undisputed that the excess policy applies only *after* the $20 million underlying primary D&O policy issued by XL has been exhausted.[3] Cobalt acknowledges that the AXIS excess policy provides "additional coverage" that applies only after Cobalt has incurred "$20,000,000 of Loss" that is covered by the XL primary policy. (Petition at ¶ 21). Cobalt, however, does not allege that it has incurred more than $20 million in Loss as necessary to trigger coverage under the AXIS excess policy or that AXIS has breached any obligation under its excess policy. Cobalt asserts only that *XL* breached the *primary* policy by "refusing to pay" Cobalt's defense costs (Petition at ¶ 64) and "demands that XL pay the sum of $14 million" to Cobalt. (Petition at ¶ 65).

Intervenors are directors and officers of Cobalt. They filed a First Amended Petition in Intervention on January 6, 2017. Intervenors assert substantially the same factual allegations as Cobalt and assert the same claim for relief against AXIS as Cobalt. (Petition in Intervention at ¶¶ 35, 52, 73).

[3] Section I of the AXIS excess policy, captioned "Insuring Agreement," as modified by Endorsement No. 4, states that "[t]he insurance afforded under this Policy shall apply only after (i) the Underlying Insurers, (ii) the Insureds or the Policyholder, and/or (iii) a "DIC Insurer" shall have paid, in currency of legal tender, the full amount of the Underlying Limits for covered loss under the Underlying Insurance and the Policyholder or the Insureds shall have paid the full amount of the applicable retention amount under any Underlying Insurance." (Petition Ex. B, at 1 & End. No.4.)

III. ARGUMENT AND AUTHORITIES

1. Plea to the Jurisdiction

A plea to the jurisdiction is a dilatory plea that challenges the existence of subject-matter jurisdiction without regard to the merits of the claim. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).

Subject-matter jurisdiction is "essential to the authority of a court to decide a case." *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443-44 (Tex. 1993). Plaintiffs bear the burden to plead facts affirmatively demonstrating the court's subject-matter jurisdiction to hear the case. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004).

When, as here, the jurisdictional facts are undisputed, the court should make the jurisdictional determination as a matter of law. *Id.* at 226. If Plaintiffs' pleadings "affirmatively negate the existence of jurisdiction," then the court should grant the plea to the jurisdiction without affording Plaintiffs an opportunity to amend. *Id.* at 226-27.

a. Plaintiffs' claims against AXIS are not ripe.

In order for Plaintiffs to assert claims against AXIS, their claims must be ripe. "Ripeness, like standing, is a component of subject matter jurisdiction, 'and like standing emphasizes the need for a concrete injury for a justiciable claim to be presented.'" *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000) (quoting *Patterson v. Planned Parenthood of Houston*, 971 S.W.2d 439, 442 (Tex. 1998)).

A matter must be ripe because courts in Texas have jurisdiction to decide only live justiciable controversies and cannot issue advisory opinions. *See, e.g.*, *South Texas Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007) ("Our separation-of-powers article prohibits courts from issuing advisory opinions that decide abstract questions of law without binding the parties."). "To constitute a justiciable controversy, there must exist a real and substantial controversy involving genuine conflict of tangible interests and not merely a theoretical dispute." *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995). For a court to issue an opinion in the absence of a justiciable dispute would constitute an impermissible "advisory opinion" because "rather than remedying an actual or imminent harm," the judgment would address "only a hypothetical injury." *Texas Ass'n of Bus. v. Air Control Board*, 852 S.W.2d 440, 444 (Tex. 1993).

The Texas Uniform Declaratory Judgments Act "does not create or augment a trial court's subject-matter jurisdiction—it is 'merely a procedural device for deciding cases already within a court's jurisdiction.'" *Transp. Ins. Co. v. WH Cleaners, Inc.*, 372 S.W.3d 223, 227 (Tex. App.—Dallas 2012, no pet.) (quoting *Tex. Ass'n of Bus.*, 852 S.W.2d at 444). Accordingly, "[a] declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought." *Bonham*, 907 S.W.2d at 467.

The undisputed jurisdictional facts as pleaded by Plaintiffs affirmatively establish the lack of a ripe controversy here. Plaintiffs pleaded that the AXIS excess policy provides "additional coverage" that applies only "after $20,000,000 of Loss" has been paid under the primary policy issued by XL. (Petition at ¶ 21; Petition in Intervention at ¶ 35). Plaintiffs fail to allege that this $20 million in underlying insurance coverage has been exhausted or even that the exhaustion of its underlying coverage may be imminent. Cobalt demands only that XL "pay the sum of $14 million" pursuant to the underlying primary policy. (Petition ¶ 65). In other words, Plaintiffs seek an improper advisory opinion that Cobalt *might* be "entitled to coverage by AXIS" in the unforeseeable future.

Plaintiffs do not assert, nor can they assert in these circumstances, that AXIS has any obligation to pay any amount to Cobalt under its excess policy or that such an obligation may be imminent. *E.g.*, *RSUI Indem. Co. v. Enbridge (U.S.) Inc.*, No. Civ. A. H-08-1807, 2008 WL 5158179, at *2 (S.D. Tex. Dec. 9, 2008) (excess insurer "has no duty to defend or indemnify until the primary policy limits are exhausted"); *Keck, Mahin & Cate v. Nat'l Union Fire In. Co. of Pittsburgh, PA.*, 20 S.W.3d 692, 700 (Tex. 2000) (excess insurer "is not obligated to participate in the defense until the primary policy limits are exhausted").

Plaintiffs' claims against AXIS are premature for the additional reason that the underlying securities litigation remains ongoing and, accordingly, Cobalt's liability, if any, in the underlying litigation remains uncertain.

In such circumstances, Texas law is clear that an insurer's coverage obligations do not become justiciable until *after* the underlying claim has been resolved. *See Farmers Texas County Mutual Ins. Co. v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997) (carving narrow exception to general rule of non-justiciability, which does not apply here); *Solstice Oil & Gas I, L.L.C. v. Seneca Ins. Co.*, 655 Fed App'x 221, 224 (5th Cir. 2016) ("Texas law only considers the duty-to-indemnify question justiciable after the underlying suit is concluded"); *Klein v. O'Neal, Inc.*, Nos. 7:03-CV-102-D, 7:09-CV-094-D, 2009 WL 3573849, *4 (N.D. Tex. Oct. 30, 2009) ("court cannot grant declaratory judgment regarding the insurer's duty to indemnify before the underlying lawsuit between the injured party and the insured defendant is resolved") (quoting *Firemen's Ins. Co. of Newark, N.J. v. Burch*, 442 S.W.2d 331 (Tex. 1968)).

For these reasons, Plaintiffs lack a justiciable claim against AXIS, and this Court lacks subject-matter jurisdiction.

b. Plaintiffs failed to satisfy the requirements of the "no action" clause, and their failure to do so means that the Court lacks subject-matter jurisdiction over the claims against AXIS.

This Court lacks subject-matter jurisdiction over Plaintiffs' claims against AXIS for the additional reason that Plaintiffs have failed to satisfy the contractual requirements of the "no action" clause. As explained below, the failure to do so means that Plaintiffs lack standing.

The AXIS excess policy states that "[n]o action may be taken" against AXIS unless, "as a condition precedent thereto," two conditions are satisfied:

(1) the "amount of the obligation" of Cobalt in the underlying litigation has been "finally determined either by judgment against [Cobalt] after actual trial, or by written agreement of [Cobalt], the claimant and [AXIS], and

(2) "full compliance with all of the terms and conditions" in the AXIS excess policy.

(Petition Ex. A, at Policy p. 9).

This "no action" clause imposes enforceable conditions precedent that must be satisfied by Plaintiffs before they may *assert* any claim for coverage under the AXIS excess policy. *See Harville v. Twin City Fire Insurance Co.*, 885 F.2d 276, 279 (5th Cir. 1989) ("'no action' clause is a valid condition precedent to liability under the policy"); *Emscor Mfg., Inc. v. Alliance Ins. Group*, 879 S.W.2d 894, 907 (Tex. App.—Houston [14th Dist.] 1994, writ denied) ("validity of [no action clause] has long been recognized in Texas") (collecting cases).

Unlike most conditions precedent, Texas law construes a "no action" clause to be ***jurisdictional*** because compliance with the clause implicates a party's standing to sue. *See, e.g.*, *McGinnis v. Union Pac. R. Co.*, CIV.A. 3:07-CV-32, 2009 WL 2900277, at *4 (S.D. Tex. Sept. 8, 2009) (Ellison, J.) ("As a condition precedent, courts have construed compliance with the no action clause as a matter of standing.") (citing *Ohio Cas. Ins. Co. v. Time Warner Entm't Co., L.P.*, 244 S.W.3d 885, 889 (Tex. App.—Dallas 2008, pet. denied)).

In other words, Plaintiffs are barred from suing AXIS unless Plaintiffs first establish that they have complied with the requirements of the "no action" clause. *See McGinnis*, 2009 WL 2900277, at *5 ("no action" clause bars suit by insured under policies); *Emscor*, 879 S.W.2d at 908-09 ("no action" clause bars suit against insurer in absence of "written agreement" or "actual trial" in underlying action); *Harville*, 885 F.2d at 279 ("no action" clause bars suit by insured where insurer was not party to settlement agreement and no trial was conducted in underlying action).

Because compliance with the "no action" clause is a key jurisdictional fact, Plaintiffs bore the burden to allege facts establishing that they complied with the "no action" clause. *See Miranda*, 133 S.W.3d at 224; *see also Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992) ("condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation").

Plaintiffs have not pleaded, nor can they plead, that either of the conditions in the "no action" clause have been satisfied. To the contrary, the facts they have pleaded affirmatively show a lack of compliance with the clause.

First, as explained above, Plaintiffs' pleaded jurisdictional facts establish that the obligations in the underlying investigations or lawsuits have not been determined either by judgment or written agreement.

Second, the pleaded facts show that Cobalt has not satisfied the terms and conditions requiring exhaustion of the underlying limits of insurance before coverage under the AXIS insurance policy may be triggered. (Petition Ex. B, at 1, 3 & End. No. 4). In addition to being integral to compliance with the no-action clause, an exhaustion provision in an excess policy is itself an enforceable condition that must be satisfied by the insured before coverage may be triggered under an excess policy. *See, e.g., Citigroup Inc. v. Federal Ins. Co.*, 649 F.3d 367, 373 (5th Cir. 2011) (no coverage under excess insurance policy where underlying limits of primary policy not exhausted through "actual" payments of loss); *Martin Resource Mgmt. Corp. v. Zurich Am. Ins. Co.*, No. 6:12-CV-758, 2014 WL 11282892, *5 (S.D. Tex. May 12, 2014) (excess policy issued by AXIS not liable to pay coverage where underlying insurance policy issued by Zurich not exhausted).

Plaintiffs do not plead that the $20 million in underlying limits of the underlying XL primary policy have been exhausted. (Petition at ¶¶ 21, 64-65, Petition in Intervention at ¶¶ 35, 66-67). In fact, Cobalt asserts that it has satisfied its conditions precedent to coverage only with respect to the XL and Illinois National primary policies. (Petition ¶ 101).

In these circumstances, the "no action" clause bars Plaintiffs from suing AXIS because Plaintiffs have failed to satisfy the exhaustion condition in the AXIS excess policy. *See Harville*, 885 F.2d at 279 (under Texas law, "no action" clause bars insured from suing excess insurer based on lack of "full compliance" with the "condition" in the excess policy requiring exhaustion of underlying coverage).

In sum, because Plaintiffs have pleaded jurisdictional facts that affirmatively demonstrate Plaintiffs' failure to comply with the "no action" clause in the AXIS excess policy, they lack standing to assert their claims.

2. Plea in Abatement

If this Court determines that it has subject-matter jurisdiction over Plaintiffs' claims (which, as shown above, it should not), then it should abate the claims until such time as would be proper for the suit to continue.

This Court has authority to abate an action or portions of an action if there is some impediment to the continuation of the suit. *See, e.g.*, *American Motorists Ins. v. Fodge*, 63 S.W.3d 801, 805 (Tex. 2001). Abatement provides the plaintiff an opportunity to cure any impediment. *Speer v. Stover*, 685 S.W.2d 22, 23 (Tex. 1985); *see also Philips v. Giles*, 620 S.W.2d 750, 751 (Tex. Civ. App.—Dallas 1981) (orig. proceeding) (sustaining plea in abatement where plaintiff's cause of action had not accrued). If the plaintiff is able to cure the impediment, the suit may proceed at that time. If the plaintiff is not able to cure the impediment, then the court may properly dismiss the suit. *See Garcia-Marroquin v. Nueces County Bail Bond Bd.*, 1 S.W.3d 366, 374 (Tex. App.—Corpus Christi 1999, no pet.).

For the reasons explained above in Section 1, Plaintiffs have no presently justiciable claim against AXIS, and Plaintiffs have failed to satisfy the requirements of the "no action" clause. Unless and until these impediments are removed, it would be improper for this matter to proceed. Thus, if the Court determines it has subject-matter jurisdiction over Plaintiffs' claims, it should abate the claims unless and until Plaintiffs remove the impediments described above.

IV. CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, the Court should dismiss Plaintiffs' claims against AXIS for lack of subject-matter jurisdiction because (1) Plaintiffs' claims are not ripe and (2) Plaintiffs have failed to satisfy the conditions in the "no action" clause and, accordingly, lack standing.

Alternatively, if the Court concludes that it has jurisdiction over Plaintiffs' claims against AXIS, the Court should abate the claims until such time, if ever, that Plaintiffs are able to state a justiciable controversy and Plaintiffs satisfy the conditions in the "no action" clause.

Dated: April 14, 2017

Respectfully submitted,

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By: */s/ Ileana Blanco*

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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically on April 14, 2017, and has been served on all counsel who have consented to electronic service. Any other counsel of record will be served by email or facsimile on this same date.

/s/ Brett Solberg
Brett Solberg

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VERIFICATION

County of Philadelphia

State of Pennsylvania

Eric S. Connuck appeared before the undersigned notary public. And, being sworn, stated as follows.

1. My name is Eric Connuck.
2. I am outside counsel for Defendant AXIS Insurance Company.
3. I have read the statements regarding Plaintiff's pleadings as asserted in the Plea to the Jurisdiction and Plea in Abatement of AXIS Insurance Company.
4. The statements are true and correct to the best of my knowledge.

[signature]
Eric S. Connuck

[signature]
Notary Public

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
SUSAN M WALDRON
Notary Public
CITY OF PHILADELPHIA, PHILADELPHIA CNTY
My Commission Expires Aug 29, 2019